Filed 9/30/03 P. v. Davis CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. SAMUEL LEE DAVIS, Defendant and Appellant.	A100090 (San Francisco County Super. Ct. No. 181322)

Defendant Samuel Lee Davis acknowledges in his opening brief that from 1995 until 1998, while administering the general assistance program in the San Francisco Department of Human Services he participated in a scheme involving the issuance of checks that were not cashed by the intended recipients. For this he was charged with, and convicted of: (1) misappropriating public funds of more than $150,000 (Pen. Code, §§ 424, 12022.6, subd. (a)(2));[1] (2) knowingly making a false account of the misappropriation (§ 424); and (3) three counts of filing false income tax returns (Rev. & Tax. Code, § 19705, subd. (a)(1)). As to each of the counts the jury found true an enhancement allegation that the offense was committed as part of a pattern of related felony conduct that involved the taking of more than $100,000, thereby exposing defendant to an additional term of two years. (§§ 186.11, subd. (a)(3), 12022.6, subd. (a)(2)).

[1] Statutory references are to the Penal Code unless otherwise indicated.

The trial court sentenced defendant to state prison for a total term of ten years, calculated as follows: eight years on the misappropriation count, consisting of the aggravated term of four years with two additional consecutive two-year terms imposed pursuant to sections 186.11 and 12022.6, and consecutive terms of eight months (one-third of the median term) for each of the false tax return counts. The aggravated term of four years was imposed on the false account of the misappropriation count, but the court stayed execution of the sentence pursuant to section 654. The court ordered defendant to pay restitution of $227,000 to the San Francisco Department of Human Services, and $48,575 to the state Franchise Tax Board for "taxes, penalties and interest."

This timely appeal by defendant involves only sentencing and restitution issues.

Section 12022.6, subdivision (a)(2) provides in pertinent part: "When any person takes . . . any property in the commission or attempted commission of a felony, with the intent to cause that taking . . ., the court shall impose an additional term as follows: [¶] . . . [¶] If the loss exceeds one hundred fifty thousand dollars. . . , the court, in addition and consecutive to the punishment prescribed for the felony . . . of which the defendant has been convicted, shall impose an additional term of two years."

Section 186.11, which establishes what it terms the "aggravated white collar crime enhancement," provides in pertinent part: "(a)(1) Any person who commits two or more related felonies, a material element of which is fraud or embezzlement, which involve a pattern of related felony conduct, and the pattern of related felony conduct involves the taking of more than one hundred thousand dollars ($100,000), shall be punished, upon conviction of two or more felonies in a single criminal proceeding, in addition and consecutive to the punishment prescribed for the felony offenses of which he or she has been convicted, by an additional term of imprisonment in the state prison as specified in paragraph (2) or (3). This enhancement shall be known as the aggravated white collar crime enhancement. The aggravated white collar crime enhancement shall only be imposed once in a single criminal proceeding. . . . [¶] (2) If the pattern of related felony conduct involves the taking of more than five hundred thousand dollars . . ., the additional term of punishment shall be two, three, or five years in the state prison. [¶]

(3) If the pattern of related felony conduct involves the taking of more than one hundred thousand dollars . . . , but not more than five hundred thousand dollars . . . , the *additional term of punishment shall be the term specified in paragraph (1) or (2) of subdivision (a) of Section 12022.6*." (Italics added.)

Defendant contends that the final portion of section 186.11, subdivision (a)(3)—which we have italicized—shows that for situations where the loss is more than $100,000 but less than $500,000, the additional term of imprisonment is exclusively the one specified by section 12022.6. The Attorney General agrees, conceding that "two-year enhancements cannot be imposed twice under both sections." We agree.

Defendant next argues that the restitution ordered to the San Francisco Department of Human Services was incorrectly set at $227,000, because the record supports a figure no higher than $218,040. The figure of $227,000 was used in the probation officer's report and in the prosecutor's sentencing memorandum. At the sentencing hearing, defendant did not challenge the accuracy of this figure, he did not present any evidence on the correct amount of restitution, he did not ask for an evidentiary hearing, and he did not object when the court fixed the amount of restitution at $227,000. In these circumstances the issue has not been preserved for appeal. (E.g., *People v. Walker* (1991) 54 Cal.3d 1013, 1023; *People v. Kwolek* (1995) 40 Cal.App.4th 1521, 1536; *People v. Zito* (1992) 8 Cal.App.4th 736, 742.)[2]

---

[2] Defendant cites *People v. Zito*, *supra*, 8 Cal.App.4th 736, for the proposition that restitution orders which are not supported by substantial evidence constitute unauthorized sentences and are therefore not subject to the waiver rule. It is true that the *Zito* court did find a restitution order reviewable even in the absence of an objection because there was no statutory basis for part of the order. As to the claim that the amount of restitution was miscalculated, the court held that the waiver rule did apply. (*Id*. at pp. 740-742.) We agree with the approach of Division Three of this court: "[T]he restitution order was authorized by the governing statute. Defendant's appeal raises a separate question of whether the facts of his case support the restitution order. That factual claim was waived when not raised in a timely fashion. Nor can defendant transform such a factual claim into a legal one by asserting the record's deficiency as a legal error." (*People v. Forshay* (1995) 39 Cal.App.4th 686, 689-690.)

In his respondent's brief, the Attorney General argues there is an additional reason for a remand—"because the trial court failed to impose the mandatory fine under Penal Code section 186.11, subdivision (c)." We express no opinion as to whether the trial court can, or must, impose such a fine. This is a matter that should be addressed to the trial court in the first instance.

The judgment is reversed and the cause is remanded to the trial court for the sole purpose of resentencing. The judgment is affirmed in all other respects.

_____
Kay, P.J.

We concur:

_____
Reardon, J.

_____
Sepulveda, J.